IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1854

In the Matter of the Application of

CHARLES E. SIGETY and
KATHARINE S. SIGETY,

Appellants,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York (Special Prosecutor)
and FRANCIS WASCHLER,

Appellees,

For an Order Pursuant to Article 23 of the
Civil Practice Law and Rules.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Department

MOTION TO DISMISS OR AFFIRM

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Appellee Charles J. Hynes, Deputy Attorney General of the State of New York and Special State Prosecutor for Nursing Homes, Health and Social Services hereby moves that the Court dismiss this appeal from an order of the Appellate Division of the Supreme Court of the State of New

York upon the grounds that the appeal is not within the jurisdiction of the United States Supreme Court and that the issue presented therein is moot. In the alternative, appellee Hynes moves that this Court affirm the aforementioned order upon the ground that the issue is so unsubstantial as not to warrant further argument.

Statement of the Case

The Attorney General of the State of New York and his deputies must, when ordered to do so by the Governor, "inquire into matters concerning the public peace, public safety and public justice." McKinney's Consolidated Laws of New York, Executive Law §63(8). By his Executive Order No. 4, Governor Hugh L. Carey directed the Attorney General to

> inquire into matters concerning the public peace, public safety and public justice with respect to possible criminal violations committed in connection with or in any way related to the management, control, operation or funding of any nursing home, care center, health facility or related entity located in the State of New York, or any principal, agent, supplier or other person involved therewith, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 [of Executive Law Section 63] for the purpose of this requirement.

9 New York Codes, Rules, and Regulations (N.Y.C.R.R.) §3.4.

The Attorney General appointed appellee Charles J. Hynes as his deputy and assigned to him the duty of conducting the inquiries mandated by Governor Carey's order.

The Attorney General specifically charged Mr. Hynes with the task of investigating any allegations that persons in the nursing home industry had violated New York State's Tax Law.

By authority of Executive Law Section 63(8) and in accord with his investigative responsibilities, Deputy Attorney General Hynes issued a subpoena duces tecum to Francis Waschler, a certified public accountant, on October 4, 1977. The subpoena commanded Mr. Waschler to produce before Deputy Attorney General Hynes his copies of the joint federal, state, and local income tax returns which he had prepared for the appellants, Mr. Charles E. Sigety and Mrs. Katharine S. Sigety, for the years 1970 through 1976, as well as the working papers and supporting documents used by Mr. Waschler in preparing the returns. Appellant Charles E. Sigety owns and operates the Florence Nightingale Nursing Home which is located in New York City.*

Mr. and Mrs. Sigety moved in the Supreme Court of the State of New York, New York County, for an order vacating, in part, the subpoena issued to Mr. Waschler. They brought their motion under Section 2304 of the New York Civil Practice Law and Rules (C.P.L.R.). They contended

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* By an earlier subpoena, which also was issued pursuant to Executive Law Section 63(8), Deputy Attorney General Hynes commanded appellant Charles Sigety to produce before him the financial books and records of Florence Nightingale Nursing Home. The subpoena was subsequently upheld as valid by the Court of Appeals of New York State. *Matter of Sigety* v. *Hynes*, 38 N.Y.2d 260, 379 N.Y.S.2d 724, 342 N.E.2d 518 (1975). Mr. Sigety did not comply fully with this earlier subpoena. Thus, the Supreme Court of the State of New York adjudged him to be in civil contempt. See *Matter of Hynes* v. *Sigety*, N.Y.L.J., August 5, 1977, at 13, col. 1 (Sup. Ct., N.Y. Co.), *aff'd*, 60 A.D.2d 808, —— N.Y.S.2d —— (1st Dept. 1978).

that the subpoena was overly broad to the extent that it required production of records which did not on their face reflect a relationship to transactions involving nursing homes. Mr. Waschler did not enter any opposition to the subpoena. Instead, he informed the court that he would abide by its decision on the motion, whether or not that decision was favorable to Mr. and Mrs. Sigety.

Deputy Attorney General Hynes opposed the Sigetys' motion. He argued that the Sigetys lacked standing to object to the subpoena, because the subpoena had been issued to a third party, Mr. Waschler, who had exclusive possession of the subpoenaed documents. To support his argument, Mr. Hynes cited *Couch* v. *United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973); *Fisher* v. *United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *United States* v. *Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976); and *Shapiro* v. *Chase Manhattan Bank*, 53 A.D.2d 542, 384 N.Y.S.2d 795 (1st Dept. 1976). The Deputy Attorney General then observed that, even if the Sigetys had standing, his authority to investigate possible state tax violations by persons involved in the nursing home industry entitled him to obtain Mr. Waschler's copies of the tax returns by means of the subpoena.

On October 28, 1977, Justice Aloysius J. Melia of the Supreme Court of the State of New York delivered an oral decision concerning Mr. and Mrs. Sigety's motion. He accepted Mr. Hynes' argument. Thus, Justice Melia held that the Sigetys did not have standing to move to quash or modify the subpoena. Appellants' Appendix A at 3a. Justice Melia also found that, assuming for the sake of argument that the Sigetys had standing, their objection to the breadth of the subpoena was meritless:

I do not think that is so, I find no standing. But again, assuming standing, I think that the subpoena is not effective [*sic*] for overbreadth or for lack of relevancy.

In that connection, I might point out that the history of the nursing home investigation is extensive. It had its genesis in legislative inquiries and the appointment of legislative commissions. In addition, the executive branch of the government, in the person of the governor, saw fit to appoint the Abrams Commission [Hon. Hugh Carey, Executive Order Nos. 2 and 2.1, 9 N.Y.C.R.R. §3.2] to look into this general area as well.

So unlike the Lentini case [*Myerson* v. *Lentini Bros. Mov. & Stor. Co., Inc.*, 33 N.Y.2d 250, 351 N.Y.S. 2d 687, 306 N.E.2d 804 (1973)], where the activities of a City commissioner were found defective in this regard, because of a lack of relevancy—there, it was just a haphazard use of the power of subpoena without a proper showing of relevancy—here, based upon the history of this investigation, which, as I say, has been extensive, bringing into play the powers of the legislature, the powers of the governor, and from all of that, it was determined that there was adequate basis for the governor, acting through the Attorney General, and vice versa, to appoint a special prosecutor to examine that which was unearthed during the legislative investigations, as well as the governor's interest in the matter. So the extraordinary remedy of the appointment of the Special Prosecutor was found to be required, and that was done, and the investigation has proceeded.

Now, there seems to be, first of all, relevancy as to the overall investigation. As to the breadth, because of the findings of these various commissions and legislative bodies, the breadth and scope of the investigation, as found in the executive order signed by the governor, is quite broad. And insofar as we are concerned here with nursing homes, in effect, it directs the Special

> Prosecutor to go into every aspect of the operation of nursing homes, to examine the whole gamut.
>
> Clearly, in the case we have here, Sigety, it is conceded that some aspects of the tax returns are concerned with the nursing home. It is conceded [by the Sigetys], first of all, that they are relevant and it is agreeable to turn them over. The argument is merely that the rest of the tax returns are not relevant.
>
> Well, first of all, the law is very clear that opposing counsel is not required to accept the dictum of the other counsel that they aren't relevant; that is a determination that counsel is permitted to make on his own.

Appellants' Appendix A at 3a-4a.

A formal order denying Mr. and Mrs. Sigety's motion was entered in the New York Supreme Court on November 2, 1977. The order reflected Justice Melia's decision in this decretal paragraph:

> ORDERED, that petitioners' [i.e. the Sigetys'] motion pursuant to CPLR 2304, to vacate, in part, the subpoena *ad testificandum* and *duces tecum*, dated October 4, 1977, served on respondent Francis Waschler by respondent Charles J. Hynes, shall be denied in all respects upon the grounds that (a) petitioners lack standing to move to quash the said subpoena and (b) assuming petitioners had standing, the subpoena is otherwise lawful[.]

See Appellants' Appendix B at 1b-2b.

Mr. and Mrs. Sigety appealed to the Appellate Division of the Supreme Court. That court stayed enforcement of the subpoena pending appeal.

In their appeal to the Appellate Division the Sigetys confined their argument to the question of standing. They did not contest the finding of Supreme Court at *nisi prius* that the subpoena itself was lawful. After the Appellate Division heard the Sigetys' appeal, it unanimously affirmed the Supreme Court's order by its own order, dated March 30, 1978. The Appellate Division did not hand down an opinion with its order.

Mr. and Mrs. Sigety did not appeal the Appellate Division's order to New York's highest court, the Court of Appeals. Instead, they brought the instant appeal directly to the United States Supreme Court. The sole issue which they present in this appeal is whether the New York courts erred in ruling that the appellants lacked standing to challenge the subpoena.*

POINT I

This appeal should be dismissed for want of jurisdiction.

This Court has jurisdiction to hear a direct appeal from a judgment or decree of a state court upholding a state statute against a claimed federal constitutional or statutory right only if the state court is "the highest court of a State in which a decision could be had." 28 U.S.C. 1257(2). When the state court is not the highest court which could have determined the federal issue, a direct appeal to this Court must be dismissed. *Costarelli* v. *Massachusetts*, 421 U.S. 193, 95 S.Ct. 1534, 44 L.Ed. 2d 76 (1975).

The appellants assert that this Court has jurisdiction under 28 U.S.C. 1257(2) to hear a direct appeal from the

* The subpoena has not been executed as of the time of this writing due to a stay of enforcement granted by the Appellate Division.

unanimous order of the Appellate Division of New York State Supreme Court which affirmed a *nisi prius* determination that they lacked standing to move under New York's Civil Practice Law and Rules for an order modifying, on grounds of overbreadth, the subpoena duces tecum issued by the Deputy Attorney General to their accountant. Appellants' Jurisdictional Statement at 4. In making this statement, they claim that by law they could not have appealed the Appellate Division's order to New York State's highest court, the Court of Appeals. *Id.*

The appellants are incorrect in stating that a further appeal to the New York Court of Appeals was impermissible. Indeed, the Constitution of New York State affords an appellant a right to appeal to the Court of Appeals from a judgment or order entered upon the decision of the Appellate Division of the Supreme Court "which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States[.]" N.Y.Const. Art. IV §3(b)(1). Section 5601(b)(1) of the New York Civil Practice Law and Rules reflects the constitutional provision with these words:

> An appeal may be taken to the court of appeals as of right from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States.

Moreover, several decisions of the Court of Appeals show that the court itself unequivocally recognizes an appellant's right to appeal to it from a unanimous ruling of the Appellate Division when the case presents a substantial constitutional question.* See, *e.g.*, *Hama Realty Co.* v. *City of N.Y.*, 20 N.Y.2d 794, 284 N.Y.S.2d 451, 231 N.E.2d 128 (1967); *Matter of Briguglio* v. *Board of Parole*, 23 N.Y.2d 669, 295 N.Y.S.2d 924, 243 N.E.2d 144 (1968); *Matter of Kariem Al Sabaa* v. *Casscles*, 34 N.Y.2d 791, 358 N.Y.S.2d 776, 315 N.E.2d 816 (1974); *Nelson* v. *Mundt*, 25 N.Y.2d 909, 304 N.Y.S.2d 601, 252 N.E.2d 134 (1969); *Zeigler* v. *Reily*, 30 N.Y.2d 517, 330 N.Y.S.2d 63, 280 N.E.2d 890 (1972), *cert. denied*, 409 U.S. 1029, 93 S.Ct. 469, 34 L.Ed.2d 323 (1972).

Since the appellants failed to avail themselves of their right to appeal the Appellate Division's order to the New York Court of Appeals, the highest court which could have passed upon what they claim to be a substantial constitutional issue, their appeal to this Court does not meet all of the requirements for jurisdiction contained in 28 U.S.C. 1257(2).** Therefore, the appeal must be dismissed.

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* Section 5601(a) of the Civil Practice Law and Rules grants a right to appeal to the Court of Appeals from an order of the Appellate Division when there has been a dissent in the Appellate Division, or where the Appellate Division has reversed or modified a determination of a lower court. The right to appeal under Section 5601(a) lies even though the case does not present a constitutional issue.

** Shortly after the *nisi prius* court denied the appellants' motion to quash the subpoena, the Appellate Division stayed enforcement of the subpoena pending their appeal. Had the appellants appealed as of right to the Court of Appeals after the Appellate Division affirmed the *nisi prius* order, the stay granted by the Appellate Division would have continued, without the need for further application by the appellants, until the Court of Appeals had heard and determined the appeal. McKinney's N.Y. C.P.L.R. §5519(a). *See DFI Communications* v. *Greenberg*, 41 N.Y.2d 1017, 395 N.Y.S.2d 639, 363 N.E.2d 1384 (1977). Thus, the subpoena could not have been enforced until the Court of Appeals first had ruled upon the merits of the appellants' appeal.

POINT II

This appeal should be dismissed for mootness.

The sole issue which the appellants raise in their jurisdictional statement is whether they had standing to argue in the New York State Supreme Court that the subpoena to their accountant was overly broad. Jurisdictional Statement at 4. Although the state court at *nisi prius* held that the appellants lacked standing, it nevertheless made a ruling on the merits of the overbreadth argument. Indeed, the court expressly stated both orally and in its formal order that, assuming the appellants had standing to raise the argument, the subpoena was not defective in any respect. See Appellants' Appendix A at 4a-5a, and Appellants' Appendix B at 1b-2b.

In the Appellate Division of the New York Supreme Court, the court which rendered the order from which the appellants now appeal, the appellants confined their arguments to the standing issue. They did not present any argument concerning the New York Supreme Court's rejection of their contention that the subpoena was defective for overbreadth.*

Since the appellants' objection to the subpoena as overly broad actually was decided on the merits by the New York Supreme Court, the only court before whom the appellants placed the contention, the issue of their standing to raise the overbreadth objection is moot. *Cf. DeFunis* v. *Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

* The Appellate Division unanimously upheld the Supreme Court's order without opinion.

Indeed, were the United States Supreme Court to reverse on the standing issue, the sole issue now before it, the New York Supreme Court's determination on the merits of the appellants' objection to the subpoena would remain undisturbed.

POINT III

Assuming that this Court has jurisdiction to hear this appeal and that the issue of the appellants' standing is not moot, the order of the Appellate Division of New York Supreme Court should be affirmed.

The subpoena duces tecum which the appellants sought to modify in the New York courts was issued by Deputy Attorney General Hynes to Francis Waschler, an independent accountant, for his retained copies of certain joint income tax returns and working papers prepared by him for the appellants. Mr. Waschler did not object to the subpoena. The appellants, however, moved in New York Supreme Court for an order modifying the subpoena on grounds of overbreadth. That court held, in part, that the appellants lacked standing to bring this motion, since the subpoena had been issued to a third party who had exclusive possession and control of the subpoenaed documents. This determination was affirmed by the Appellate Division in the order from which this appeal is taken.

The decision of the United States Supreme Court in *United States* v. *Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), is dispositive of the issue of standing, the sole issue raised by the appellants on this appeal. The Court held in *Miller* that a depositor lacked standing to challenge a subpoena duces tecum issued by the

government to a bank for the records of the depositor's account. The Court based this conclusion upon the well settled principle that the Fourth Amendment cannot be invoked by a person to prevent the government from obtaining information disclosed by him to a third party, regardless of the intended confidentiality of that disclosure.* As stated by the Court:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, *even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed* (emphasis added).

United States v. *Miller*, *supra*, 425 U.S. at 443.

This Court's decision in *Miller* was in full accord with its earlier decision in *Couch* v. *United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). The facts in *Couch* are remarkably similar to the facts of the instant case. In *Couch*, the Internal Revenue Service had issued a summons to an accountant commanding the production of various business records belonging to Ms. Couch. Ms. Couch previously had delivered these records to the accountant to enable him to complete her tax returns. The Internal Revenue Service commenced a proceeding to compel compliance with the subpoena. Ms. Couch intervened in the proceeding. She claimed that compliance with the subpoena by her accountant would violate her rights under the Fourth and Fifth Amendments. 409 U.S. at 325, n.6. This Court held that Ms. Couch had no right under either amend-

* New York law does not provide a privilege of confidentiality between an accountant and his client.

ment to bar her accountant from complying with the summons. The Court observed that the essential ingredient for a violation of the privilege against self-incrimination, compulsion against the person giving the evidence, was missing, since the subpoena was directed to Ms. Couch's accountant and not to herself. 409 U.S. at 336. The Court also found that Ms. Couch could not object to compliance with the summons on Fourth Amendment grounds because she had no legitimate expectation of privacy in the records called for by the summons. *Id.*

Application of the holdings of *Miller* and *Couch* to the facts of the present appeal leads ineluctably to the conclusion that the New York courts were correct in ruling that the appellants lacked standing to object to the subpoena duces tecum. The appellants willingly divulged to their accountant, Mr. Waschler, the information which he used to prepare their joint tax returns. They knowingly took the risk that their accountant might disclose this information, which is now memorialized in his retained copies of those returns and his working papers, to third parties other than the Internal Revenue Service. Therefore, under *Miller* and *Couch*, the appellants canont claim that the Deputy Attorney General should be prevented from obtaining that information from a third party by means of the subpoena duces tecum.

Since the holdings of *Miller* and *Couch* are contrary to the position taken by the appellants on the standing issue, the present appeal is unsubstantial. Therefore, if this appeal should not be found defective for want of jurisdiction and for mootness, the order of the Appellate Division of New York Supreme Court should be affirmed without further argument.

Conclusion

This appeal should be dismissed upon the ground that the United States Supreme Court lacks jurisdiction to entertain it and upon the additional ground that the appeal is moot. In the alternative the order from which the appeal is taken should be affirmed without further argument.

Respectfully submitted,

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